Supreme Court, U.S.
FILED

94205 6 JUN 15 1995

OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROBERT W. KEARNS,

Petitioner,

v.

TOYOTA MOTOR COMPANY, LTD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT W. KEARNS, PH.D.
Manufacturer-Inventor
Petitioner pro se
301 Houghton Laboratory Lane
Queenstown, Maryland 21658
(410) 827-9337

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

7480

QUESTIONS PRESENTED

1a. Are the circumstances under which a trial judge may enlarge the time for seeking reconsideration of a final judgment in complex cases unclear, as a mere reading of A 52-54 of the decision of the Court of Appeals shows?

1b. Is there an irreconcilable conflict between the decision of the court below and *Miller* v. *Maxwell's Int'l., Inc.*, 991 F.2d 583, 585 (9th Cir. 1993) as admitted in footnote 17 A 53 of the decision below?

2. Where, as here, the District Court granted a party's motion for an extension of time to file a motion to reconsider a judgment and also found that "Plaintiff has filed a timely motion for reconsideration" does the burden shift to the party challenging the court's action to prove that the court acted improperly?

3. Where a party moving to dismiss an appeal fails to submit to the Court of Appeals the paper that gave the reasons for seeking an extension of time, should it be permitted to contend that the reasons are inadequate?

4. Where the case of Question 2 involved a *pro se* plaintiff who relied on oral and written words of the Court as to the time for taking an action, should the Court of Appeals take a liberal view of Rule 1, Fed. R. Civ. P., so as to avoid dismissing an appeal on a technicality?

5. Where a suit was very complex (as for example an individual inventor's patents being infringed by almost all automobile assembler's of the western world, so that the legal fees would run to many millions of dollars thus causing the inventor to proceed *pro se*,) should Rule 1, Fed. R. Civ. P. be construed liberally to avoid the case turning on technicalities?

PARTIES TO THE PROCEEDING

ROBERT W. KEARNS,

Petitioner,

vs.

CAFC No. 94-1305, -1321

TOYOTA MOTOR COMPANY, LTD.,
NISSAN MOTOR CO., LTD.,
HONDA MOTOR CO., LTD.,
TOYO KOGYO CO., LTD. (MAZDA) and
FUJI HEAVY INDUSTRIES, LTD. (SUBARU)

Respondents.

ROBERT W. KEARNS,

Petitioner,

vs. CAFC No. 94-1307

WOODS MOTORS, INC.,
DAIMLER-BENZ AKTIENGESELLSCHAFT, and
DR. ING. h.c.f. PORSCHE A.G.
SWF-SPECIALFABRIK fur
AUTOZEBEHOR GUSTAV RAU G.m.b.H.,
a corporation of the Federal
Republic of Germany

Respondents.

ROBERT W. KEARNS,

Petitioner,

vs. CAFC No. 94-1308

FRED LAVERY PORSCHE,
WOOD MOTORS, INC.,
VOLKSWAGEN WERKE A.G. WOLFSBURG, and
AUDI NSU AUTO UNION, A.G.

Respondents.

ROBERT W. KEARNS, Petitioner,
v. CAFC No. 94-1306
FERRARI S.p.A.,
AB-VOLVO,
ALFA ROMEO S.p.A.,
AUTOMOBILES-CITROEN, S.A.
BAYERISCHE MOTOREN WERKS, A.G.,
B-L, PLC (British Leland)
FUJI HEAVY INDUSTRIES, LTD.
GROUP LOTUS CARS CO.
HONDA MOTOR CO., LTD.
ISUZU MOTOR CO., LTD.
MITSUBISHI MOTORS CORP.
NISSAN MOTOR CO., LTD.
OFFICIENE ALFIERE MASERATI,
PEUGEOT, S.A.
REGIE NATIONALE RENAULT
ROLLS ROYCE MOTORS, LTD.
SAAB-SCANIA AB,
TOYO KOGYO CO., LTD.(Mazda)
TOYOTA MOTOR CO., LTD
Dealers in the Detroit area:
BARNETT PONTIAC-DATSUN, INC.
BAVARIAN MOTOR VILLAGE, LTD
DALGLIESH CADILLAC-PEUGEOT
JOE DWYER SUBARU VOLVO, INC.
FALVEY OF TROY
GROSSE POINTE AMC-JEEP RENAULT
LA FONTAINE TOYOTA
SEAWAY MOTORS, INC.
SPORTS CAR EXCHANGE, INC.
TAMAROFF BUICK-DMC-HONDA-ROLLS ROYCE, and
WOOD MOTORS, INC. Respondents.

ROBERT W. KEARNS,

Petitioner,

vs. CAFC No. 94-1310

UNITED TECHNOLOGIES CORP. and
UNITED TECHNOLOGIES AUTOMOTIVE, INC.

Respondents.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
STATUTES INVOLVED 2
APPLICATION FOR PATENT 2
§112. Specifications 2
§154. Contents and term of patent 3
§281. Remedy for infringement of patent 3
§283. Injunction 3
§284. Damages 4
SIXTH CIRCUIT RULE INVOLVED 4
TITLE 28 §1654 RULE 4
§1654. Appearance personally or by counsel . . . 4
FEDERAL RULES OF CIVIL PROCEDURE 4
Rule 1. Scope and Purpose of Rules 4
Rule 6. Time 5
Rule 59. New Trials; Amendment of Judgments . 5
STATEMENT OF THE CASE 6
ARGUMENT 7

TABLE OF AUTHORITES

	Page
Constitutional Authorities:	
Art. I, § 8, Cl. 8	1, 9
Amendment VI	2
Statute Authorities:	
28 U.S. Code	
§ 1254. Courts of appeals; certiorari; certified questions	1
§ 1654. Appearance personally or by counsel	4
35 U.S. Code	
§ 112. Specification	2
§ 154. Contents and term of patent	3, 9
§ 281. Remedy for infringement of patent	3, 9
§ 283. Injunction	3
§ 284. Damages	4
§ 1338. Patents, plant variety protection, copyrights, mask works, trade-marks, and unfair competition	1
Repealed Title 35 U.S. Code	
§ 40. Same; contents and duration	2
Sixth Circuit Authority	4
Fed. R. Civ. P. Authorities:	9
Rule 1. Scope and Purpose of Rules	4
Rule 1. 1993 AMENDMENT note	7, 8

Page

Rule 6. Time

(b) Enlargement 5

Rule 59. New Trials; Amendment of Judgments

(e) Motion to Alter or Amend a Judgment 5

Cases Cited:

Kearns v. *Chrysler Corp. and American Motors Corp.* 32 F.3d 1541 (Fed. Cir. 1994) 6

Miller v. *Maxwell's Int'l., Inc.*, 991 F.2d 583, 585 (9th Cir. 1993) 8

Kearns v. *United Technologies et al.* CAFC No. 94-1310 9

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert W. Kearns, ("Dr. Kearns") prays that the Court issue a writ of certiorari to review the Questions Presented and those fairly included therein. The questions presented are sought to be reviewed in this one Petition for the multiple cases identified on all the cover pages under Supreme Court Rule 12.2 as they originate with the same District Court, are relevant to the same Court of Appeals, and involve aspects of the identical or closely related questions.

OPINIONS BELOW

The reports of the opinions delivered in the cases by the Court of Appeals are located at **A 22** and at **A 49**.

JURISDICTION

The final opinion of the Court of Appeals was entered on 15 February 1995. On 26 April 1995 Dr. Kearns filed an application for enlargement of times to file this petition for writ of certiorari. The application was granted by order (A-805) of this Court to and including June 15, 1995. Jurisdiction to review this petition by writ of certiorari is conferred upon the Court by 28 U.S.C. § 1254(1) (1988). The district court had jurisdiction over the claims in the first instance under the provisions of 35 U.S.C. § 1338(a) (1970).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 8

"The Congress shall have the power:

> To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES INVOLVED

35 U.S.Code[1] Patents, provides:

APPLICATION FOR PATENT

§ 112. Specification

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the

---

[1] Repealed Title 35 U.S. Code

§ 40. Same; contents and duration

Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery (including in the case of a plant patent the exclusive right to asexually reproduce the plant) throughout the United States and Territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof. R.S. §4884; May 23, 1930, c.312, § 1, 46 Stat. 376.
Derivation. Act July 8, 1870, c. 230, § 22, 16 Stat. 201.

same, **and shall set forth the best mode contemplated by the inventor for carrying out his invention.**

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. July 19, 1952, c. 950, § 1, 66 Stat. 798.

§ 154. Contents and term of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof. July 19, 1952, c.950, § 1, 66 Stat. 804.

§ 281. Remedy for infringement of patent: A patentee shall have remedy by civil action for infringement of his patent. July 19, 1952, c. 950, § 1, 66 Stat. 812.

35 U.S.C. § 283, Patents, provides:

§ 283. Injunction: The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable. July 19, 1952, c. 950, § 1, 66 Stat. 812.

§ 284. Damages

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances. July 19, 1952, c. 950, § 1, 66 Stat. 813.

SIXTH CIRCUIT RULE INVOLVED

That a Senior Judge cannot adjudge a case outside his district if a case on his docket is there for more than five years. District Judge Cohn in Transcript of Proceedings of 7 January 1992 in *Kearns* v. *Chrysler Corp.* and *American Motors Corp.*

TITLE 28 § 1654 RULE

§ 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. (As amended May 24, 1949, c. 139, § 91, 63 Stat. 103.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States

district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Rule 6. Time

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 71(a), and 74(a), except to the extent and under the conditions stated in them.

Rule 59. New Trials; Amendment of Judgments

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

Plaintiff, an individual manufacturing inventor **A 1-2** sued all[2] of the automobile assemblers in the western world in the Detroit District Court for infringement of his patents on windshield wiper systems with intermittent operation. The suit against the Ford Motor Co. was tried in 1990, followed by a suit tried against Chrysler Corp. and American Motors Corp. in 1992 with infringement found[3]. *See Kearns* v. *Chrysler Corporation and American Motors Corp.*, 32 F.3d 1541(Fed. Cir. 1994). The plaintiff was required to proceed *pro se* during the damage phase of the Chrysler and American Motors case and continued into this *Toyota, et al.*[4] case. When in the discovery phase, the District Court ruled during a proceeding on 26 January 1994 that Plaintiff could not possibly pursue all of the cases and dismissed the *Ferrari (plus)* cases as well with prejudice. **A 3,4** Within ten days after the judgment, plaintiff called the Judge's deputy about an extension of time for a motion to reconsider. A xx The Judge orally approved the extension and then entered a formal order granting the motion giving plaintiff until February 22, 1994 to file the motion for

---

[2] except Fiat who is not in the U.S. of A. market

[3] Ford admitted infringement if the patents were valid. The *Ford* jury found six out of six of plaintiff's patents' to be valid. Chrysler and American Motors challenged infringement. The *Chrysler and American Motors* jury found infringement of four out of four of the patents found valid in *Ford*.

[4] composed of Toyota Motor Co., Ltd.; Nissan Motor Co., Ltd.; Honda Motor Co., Ltd.;Fuji Heavy Industries, Ltd. (Subaru); and, Toyo Kogyo Co., Ltd. (Mazda).

reconsideration. **A 7** There were plenty of facts available to the trial judge to justify the extension. There had been severe ice storms for more than a week in both Washington, D.C. and in Queenstown, on Maryland's Eastern Shore where Plaintiff works. The Court of Appeals for the Federal Circuit itself had closed its offices for a day due to the storms. Moreover, plaintiff's motion, to extend time **A 7**, referred to Exhibit A which described all the facsimiles he had sent to the Judge's deputy which described how the ice storms cut off his electrical power rendering plaintiff's office equipment inoperative. Defendants did not include this exhibit in its motion to the Court of Appeals.

The District Court, six weeks later, held[5] "Plaintiff has filed a timely motion for reconsideration." and also reaffirmed his original judgment. **A 22** Thirty days later, plaintiff filed his appeal. In its first decision the Court of Appeals held the appeal untimely on the ground that plaintiff's appeal was 31 days after the decision on reconsideration, **A 24** but after plaintiff pointed to the correct date of his notice the Court of Appeals changed its ground and held that the motion for reconsideration was untimely, thus rendering the appeal untimely. **A 49**

ARGUMENT

The decision of the Court of Appeals in this case, pages **A**

---

[5] Fed. R. Civ. P. Rule 1 1993 AMENDMENT

The purpose of this revision, adding the words "and administered" to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

52-54 shows the uncertainty of the law as applied to extensions of time for rehearing motions. The Court below seemingly thought that the District Judge should have stated the reasons for his action. This is hardly in the inter-est of justice. Clearly, if such reasons are required, the proper judicial conduct would be to remand that asks the trial judge for more details.

Miller v. *Maxwell's Int'l., Inc.*, 991 F.2d 583, 585 (9th Cir. 1993) is in direct conflict with the decision in this case. If a showing of unique circumstances is required, the massive complexity of the case plus the trial court's decision of February 4, 1994 **A 4** should suffice. Indeed, the Court of Appeals on **A 50** of its decision pointed out that the trial court had found that plaintiff "was unable to adequately represent himself."

The District Judge told a *pro se* plain-tiff, within the ten day period, that an extension would be granted. **A 9** It is simply a gross injustice to deprive a *pro se* party of his right to appeal when he acted in accordance with an order of the District Judge.

In 1993, this Court amended Rule 1, Fed. R. Civ. P. to require court to apply the rules liberally to achieve justice. This certainly means that a Court of Appeals should not dismiss an appeal under the circumstances of this case. Here, plain-tiff's patent suits are very serious. Plaintiff has defeated Ford, Chrysler and American Motors on the merits.

Suits are getting more and more complex as the calendar moves from year to year. More and more citizens have claims which are very complex. Getting lawyers to handle massive cases is not easy because of conflicts, for example. The little guy should get a break every now and then. Thus,

a *pro se* plaintiff who relies upon the action of a judge of long experience should not be thrown out on a technicality by the Court of Appeals.

The matter raised in the preceding paragraph is of great importance as individuals have more and more complex claims and are forced to proceed on them *pro se*. How such cases should be handled is as big a question as questions can get. If the courts dismiss *pro se* cases on reasons as thin as given by the Court of Appeals, then the judicial remedies will be restricted to large corporations.

That there is a problem here worthy of this Court's time is exemplified by *Kearns* v. *United Technologies et al.* where the inventor's case was dismissed by the District Court before he had done anything - yet, anything wrong. It was dismissed presumably because the *pro se* inventor was said not to be able to handle other cases - so goes their logic - he cannot handle *Kearns* v. *United Technologies et al.* either. Innocent until proven guilty doesn't apply to automotive systems inventors in Detroit? Note the Constitutional standard. The government is to secure the inventor's exclusive rights for limited times and to promote science and the useful arts.

Are the Fed. R. Civ. P. complete? Presently when an invention is successful (infringed by many) if the trials are litigated in series the inventor cannot retain his exclusive right to his own discoveries because the 'limited times' are said to 'expire' during the lengthy Judicial 'remedy' trials. Should the cases be litigated in parallel, the *pro se* inventor drowns in all the legal paper coming at him(er) from all sides. Dr. Kearns has insights to share. For the reasons stated, the petition for certiorari should be granted.

APPENDIX

APPENDIX
TABLE OF CONTENTS

Dr. Kearns as manufacturing-inventor:	Page
Computer Central© intermittent wind-shield wiper electronic control module	A 1
Computer Central© DDA/840 Digital Difference to Analog Converter	A 2
From the transcript of the *Toyota, et al.* proceedings of 26 January 1994 p. 22	A 3
ORDER OF DISMISSAL (formal)	A 4
KEARNS' MOTION FOR ENLARGEMENT OF TIMES TO FILE HIS COURT PAPERS AND OTHERWISE COMPLY WITH THE COURT'S RULES & ORDERS	A 7
ORDER EXTENDING TIME	A 11
PLAINTIFF ROBERT W. KEARNS' MOTION FOR RECONSIDERATION	A 12
ORDER (of dismissal)	A 22
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 94-1305,-1321 ORDER of 15 September 1995	A 24
APPELLANT KEARNS' OBJECTION TO THE CLERK IN 14 DAYS IN COMPLIANCE WITH PANEL 94-1305, -1321'S ORDER of 15 September 1994	A 27
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 94-1305,-1321 ORDER of 15 February 1995	A 49

A1

BEST AVAILABLE COPY

DD/Aコンバータ
MODEL 840

新製品

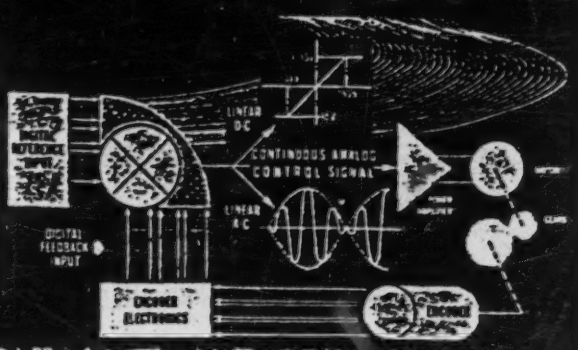
デジタル量の差を
アナログ量に
変換する装置

■超高精度

$\frac{1}{12\text{億}}$ %

■変換時間

2μsec.



●この製品への直接のお問い合わせは、本社第3事業部まで御連絡下さい●

米国コンピューター・セントラル社
極東総代理店

☆ 株式会社 チトセ商会

本　社：〒103東京都中央区八重洲1－8－17新槇町ビル14F
☎（03）272－3321（代）

大阪支社：〒532大阪市淀川区西中島7－1－25新大阪池畳ビル6F
☎（06）304－3931（代）

名古屋支社：〒450名古屋市中村区広井町2－44－4広井町パークビル5F
☎（052）562－0200（代）

From the transcript of the *Toyota, et al.* proceedings of 26 January 1994 p. 22:

THE COURT (continuing): [N]ever get to trial. And if it did, Plaintiff would be unable to present a case. This case is dismissed with prejudice.

Mr. Badenoch, you will prepare the appropriate order.

MR. BADENOCH: Thank you, your Honor.

THE COURT: That also includes the cases against the Defendants whose matters have been stayed.

MR. KEARNS: By what authority is that last order, your Honor?

THE COURT: By the authority of the Court. The authority vested in me as a United States District Judge for the Eastern District of Michigan in a case regularly assigned to my docket.

I don't say this fecitiously, Dr. Kearns, but you certainly know where to go if you disagree with what I've done. ... .

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,
Plaintiff,
v. Honorable Avern Cohn
Civil No. 78-70642
WOOD MOTORS, INC., *et al.*
Defendants.
_____/

ROBERT W. KEARNS,
Plaintiff,
v. Civil No. 82-70749
FRED LAVERY PORSCHE, *et al.*
Defendants.
_____/

ROBERT W. KEARNS,
Plaintiff,
v. Civil No. 85-70459
FERRARI, *et al.*
Defendants.
_____/

ORDER OF DISMISSAL

The court having reviewed the papers filed in ;connection with Defendants' Motion to Dismiss in veil Action No. 85-70459, the Special Master's Report filed in response to Pretrial Order No. 10 in that case and the letters of defense counsel filed in response thereto, and having held a hearing on Defendants' Motion to Dismiss and the Special Master's report on January 26, 1994;

The Court being satisfied that, after giving full consideration to the record in this case, as well as the records in the Chrysler and General Motors cases, the Special Master's report and the letters from counsel for

defendants in response to the Special Master's report, plaintiff lacks the ability to adequately manage the pretrial matters remaining in this case and also lacks the ability to adequately represent himself in the trial of this case, and plaintiff having categorically refused to retain counsel with authority to manage the case in a manner that would be appropriate, proper and prudent;

The Court having taken note of the manner in which plaintiff has responded to the discovery matters outstanding in this case and the manner in which he has responded at the January 26, 1994 hearing to Pretrial Order No. 10, as well s plaintiff's failure to act reasonably with regard to discovery matters, the confusion exhibited in his papers and in his oral presentations to the Court, his inability to focus, his inability to understand the rules of law, his failure to follow the Court's orders, his failure to comply with discovery orders, such that in the court's view this case will never get to trial, and if it did, plaintiff would be unable to present a case; all of which prejudices defendants by subjecting them to inordinate expense in attempting to secure discovery, by depriving them of discovery to which they are entitled, and ;by making it impossible for them to prepare for trial;

The Court having concluded that the cases against the non-moving defendants, which have been stayed pending the outcome of the case against the moving defendants, will inevitably present the same issues and problems arising from plaintiff's failure to obey discovery orders and retain counsel;

NOW, THEREFORE, for the foregoing reasons, the reasons stated on the record at the January 26, 1994 hearing, the reasons set forth in Defendants' Motion to Dismiss, the Supplemental Memorandum in Support of Defendants' Motion to Dismiss, the Special Master's report

and the letters from counsel in response thereto, it is hereby, ORDERED that:

1. Defendants' Motion to Dismiss in Civil Action No. 85-70459 is granted.

2. The above-captioned cases* and plaintiff's claims against each of the defendants in the above-captioned cases are hereby dismissed with prejudice.

Dated JAN 28 1994 s/

Avern Cohn

United States District Judge

*Case No. 78-70642 and Case No. 82-70749 were consolidated with Case No. 85-70459 on December 18, 1992.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,
Plaintiff,

v.

Civil No. 78-CV-70642
Honorable Avern Cohn
Special Master Barker

WOODS MOTORS, INC., DAIMLER-BENZ AKTIENGESELLSCHAFT, and DR. ING. h.c.f. PORSCHE A.G.,
Defendants.

ROBERT W. KEARNS,
Plaintiff,

v.

Civil No. 82-70749
Honorable Avern Cohn
Special Master Barker

FRED LAVERY PORSCHE, WOOD MOTORS, INC., VOLKSWAGEN WERKE A.G. SOLFSBURG, and AUDI NSU AUTO UNION, A.G.
Defendants.

ROBERT W. KEARNS,
Plaintiff,

v.

Civil No. 85-70459
Honorable Avern Cohn
Special Master Barker

FERRARI S.p.A.,
AB-VOLVO,
ALFA ROMEO S.p.A.,
AUTOMOBILES-CITROEN, S.A.
BAYERISCHE MOTOREN WERKS, A.G.,
B-L, PLC (British Leland)

FUJI HEAVY INDUSTRIES, LTD.
GROUP LOTUS CARS CO.
HONDA MOTOR CO.
ISUZU MOTOR CO., LTD.
MITSUBISHI MOTORS CORP.
NISSAN MOTOR CO., LTD.
OFFICIENE ALFIERE MASERATI,
PEUGEOT, S.A.
REGIE NATIONALE RENAULT
ROLLS ROYCE MOTORS, LTD.
SAAB-SCANIA AB,
TOYO KOGYO CO., LTD (Mazda)
TOYOTA MOTOR CO., LTD

Dealers in the Detroit area:

BARNETT PONTIAC-DATSUN, INC.
BAVARIAN MOTOR VILLAGE, LTD
DALGLIESH CADILLAC-PEUGEOT
JOE DWYER SUBARU VOLVO, INC.
FALVEY OF TROY
GROSSE POINTE AMC-JEEP RENAULT
LA FONTAINE TOYOTA
SEAWAY MOTORS, INC.
SPORTS CAR EXCHANGE, INC.
TAMAROFF BUICK-DMC-HONDA-ROLLS ROYCE, and
WOOD MOTORS, INC. Defendants.

ROBERT W. KEARNS,
Plaintiff,

v.

UNITED TECHNOLOGIES CORP., and
UNITED TECHNOLOGIES AUTOMOTIVE, INC.
Defendants.

Filed 13 Mar 1992 2:23p
Civil No. 92-71408DT
Honorable Avern Cohn

KEARNS' MOTION FOR ENLARGEMENT OF TIMES TO FILE HIS COURT PAPERS AND OTHERWISE COMPLY WITH THE COURT'S RULES & ORDERS

Plaintiff, Robert W. Kearns, hereinafter ("Dr. Kearns") sought enlargements of times to file his court papers and otherwise comply with the respective court's rules and orders on 11 February 1994 via facsimile to the respective court's clerks [Exhibit A]. This is not adequate under the rules so the purpose of this paper is two-fold: first, to record the court's verbal agreement to enlarge the time for a Motion for Reconsideration (Ferrari plus) to 22 February 1994; for a response to United Technologies Motion to Dismiss to 4 March 1994 based on the situation at that time with the United Hearing to follow the Court's travels after the week of 14 March 1994; and second to send formal papers to the clerk for the files in accordance with the rules.

Dr. Kearns was fortunate to get the facsimile sent to all parties, with copies per the Certificate of Service to all - before the power went down again to stay down into 14 February 1994. Dr. Kearns' copier is still down. Accordingly, Dr. Kearns requests that four days be added to the above dates of the presently agreed Order being prepared by Deputy Clerk Cassady, with whom and through whom all of this transpired.

Respectfully submitted,

S/

Robert W. Kearns, Pro Se
301 Houghton Laboratory Lane
Queenstown, Mary land 21658
(410) 827-9337 (Tel/Fax)

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of KEARNS' MOTION FOR ENLARGEMENT OF TIMES TO FILE HIS COURT PAPERS AND OTHERWISE COMPLY WITH THE COURT'S RULES & ORDERS with Exhibit A was sent by first class mail, postage prepaid to:

Clerk (2)(Ferrari plus)(85-70459)

Clerk (2)(United)(92-71408)

and without Exhibit A to:

Special Master Barker George E. Badenoch Dennis Allegretti

this 15th day of February 1994.

S/

Robert W. Kearns

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT KEARNS,

Plaintiff,

-vs-

Civil No. 85-70459

TOYOTA, NISSAN, HONDA,
TOYO KOGYO (MAZDA) and
FUJI (SUBARU)

Defendants,

_____/

ORDER EXTENDING TIME

Plaintiff having requested an extension of time to file a Motion for Reconsideration and the Court being fully advised;

IT IS ORDERED that the request for an extension of time is GRANTED and plaintiff shall file his motion on or before FEBRUARY 22, 1994.

s/
AVERN COHN
United States District Judge

Dated: February 15, 1994
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,
Plaintiff,

v. Civil No. 78-CV-70642
Honorable Avern Cohn
Special Master Barker

WOODS MOTORS, INC., DAIMLER-BENZ AKTIENGESELLSCHAFT, and DR. ING. h.c.f. PORSCHE A.G.,
Defendants.

ROBERT W. KEARNS,
Plaintiff,

v. Civil No. 82-70749
Honorable Avern Cohn
Special Master Barker

FRED LAVERY PORSCHE, WOOD MOTORS, INC., VOLKSWAGEN WERKE A.G. SOLFSBURG, and AUDI NSU AUTO UNION, A.G.
Defendants.

ROBERT W. KEARNS,
Plaintiff,

v. Civil No. 85-70459
Honorable Avern Cohn
Special Master Barker

FERRARI S.p.A.,
AB-VOLVO,
ALFA ROMEO S.p.A.,
AUTOMOBILES-CITROEN, S.A.
BAYERISCHE MOTOREN WERKS, A.G.,
B-L, PLC (British Leland)
FUJI HEAVY INFUSTRIES, LTD.

GROUP LOTUS CARS CO.
HONDA MOTOR CO.
ISUZU MOTOR CO., LTD.
MITSUBISHI MOTORS CORP.
NISSAN MOTOR CO., LTD.
OFFICIENE ALFIERE MASERATI,
PEUGEOT, S.A.
REGIE NATIONALE RENAULT
ROLLS ROYCE MOTORS, LTD.
SAAB-SCANIA AB,
TOYO KOGYO CO., LTD (Mazda)
TOYOTA MOTOR CO., LTD

Dealers in the Detroit area:

BARNETT PONTIAC-DATSUN, INC.
BAVARIAN MOTOR VILLAGE, LTD
DALGLIESH CADILLAC-PEUGEOT
JOE DWYER SUBARU VOLVO, INC.
FALVEY OF TROY
GROSSE POINTE AMC-JEEP RENAULT
LA FONTAINE TOYOTA
SEAWAY MOTORS, INC.
SPORTS CAR EXCHANGE, INC.
TAMAROFF BUICK-DMC-HONDA-ROLLS ROYCE, and
WOOD MOTORS, INC.

Defendants.

PLAINTIFF ROBERT W. KEARNS' MOTION FOR RECONSIDERATION

Plaintiff, Robert W. Kearns (hereinafter "Dr. Kearns") moves this Court for Reconsideration of its Order of Dismissal entered very late in the day (after Dr. Kearns' telephone call to the Docket Clerk) on 4 February 1994. The reasons for the Order of Dismissal are simply too numerous to needlessly repeat herein

within the 20 pages that are better used for Dr. Kearns' defense. Intending to respond to each allegation, Dr. Kearns will begin with the points he thinks most irksome to the Court and Dr. Kearns.

Defendants' Request to Produce No. 1 to Plaintiff is given in Exhibit A:

> Request No. 1
>
> All documents produced by plaintiff in prior litigations involving any of the patents in suit.

The Court ordered that Kenyon & Kenyou legal personnel could have access to all the documents at this address. The full address here is 301 Houghton **Laboratory** Lane, wherein Kearns Engineers[1] and the Houghton Laboratory are on the Lane. This address is more of a laboratory research facility than a law office with inventor's log books, drawings, drafting tables, oscilloscopes, electric power supplies, measuring instruments, and paper - lots of paper. Said records are on four levels. Nominally five Kenyon & Kenyon law persons participated with only Dr Kearns here during the day and evening, from 5 May 1993 through the end of July, 1993.

The ground rules were defined in Exhibit B dated 5 May '93. Relevant portions are:

After copies are made ... Kearns will then "pull" from those copies and keep separate from other documents any materials which he wishes to withhold from production because of claims of attorney-client privilege or attorney work product or be-cause they are outside the scope of the Request for Production.

Dr. Kearns will release ... documents ... he does not claim privilege ... and will serve upon Defendants ... a list of all documents withheld ... .

---

[1] including *Computer Central*®

Furthermore, ... review and/or copying of any document by the Defendants personnel at Dr. Kearns' offices will not, in and of itself, constitute a waiver of Dr. Kearns' right to assert pri-vilege in any such document. Waiver will attach only after Dr. Kearns has reviewed and released any such document.

On 10 August '93, Dr. Kearns had to file a motion for a Protective Order against a Master's Order. Relevant portions are [Exhibit C]:

Surely, this Court would not practice "bait and switch" in changing the ground rules under which the Court gained access to Dr. Kearns' home and his documents. Dr. Kearns can't be expected to waive his rights and privileges under the agreed ORDER by willynilly releasing said documents without review. Dr. Kearns desires a reasonable time to review the documents... .

Judge Cohn effectively granted the Protective Order in allowing Dr. Kearns 60 days to review the 29,000 documents copied. While Dr. Kearns suffered emergency medical surgery with a period of recuper-ation, he completed the review in 53 countable days. At that time, Dr. Kearns had been placed in a catch-22 position, as Kenyon & Kenyon would not agree to making his single, promised-copy of such documents shipped when they had to make 30 copies for others. Without such assurance, Dr. Kearns would have to take the time to make a copy of the documents for himself, or, if he did not, he would not have copies for his *Toyota et al.* files. Accordingly, he timely shipped the copies to the Court and it graciously ordered a copy for Dr. Kearns' Toyota file from Kenyon & Kenyon.

Of immediate relevance here, the Court allowed Kenyon & Kenyon to write an order (Dr. Kearns had been denied his request to participate) that required Dr. Kearns to ship the documents on which he claimed privilege to Toledo, Ohio (out of the house, again) for varification checking. It is important to note that the Master and his staff came here (in keeping with the Protective Order) for eight days of 'privilege determining' assistance. Dr.

Kearns' review for privilege occurred after this work, but did not duplicate where privilege had been found. The Master's staff having separated the documents they found to be privileged, placing them in cabinet 24. A copy of the required list of documents withheld prepared by Dr. Kearns is given in Exhibit D. Eight categories of privilege were used: attorney-client; work product; protected by common-law rights[2]; those work product w/notes; not relevant; outside the scope; and, Fed. R. Civ. P. Rule 26(b)(1)(a)(i)[3]; and documents under a Protective Order.

At the hearing, Dr. Kearns told the Court of his concerns about Toyota, Honda, Nissan, Fuji Heavy Industries and Toyo Kogyo having copied Ford Motor Co. engineering drawings. Exhibit F consists of pages from the Kearns-Ford Motor Company settlement agreement. Paragraph 6.7 is relevant:

> Ford releases and discharges Plaintiff from all existing claims that arise out of any event, act, or omission that occurred **before the date of this Agreement**, including any act, omission, or event referred to in any pleading filed in the Action. [**Emphasis** added.]

Exhibit G is the *Kearns* v. *Ford Motor Company* PROTECTIVE ORDER. Paragraph 5 is relevant:

> All documents produced by a party to this suit to an opposing party whether designated "Confidential", "Lawyer-Confidential" **or neither** shall be used by the party receiving the document only for purposes of this suit.

Dr. Kearns has no desire to be sued by the Ford Motor Company for violating our PROTECTIVE ORDER by producing Ford engineering drawings to their Japanese competitors, or anyone

---

[2] *Patent Law Fundamentals*, Peter D. Rosenberg p. 15. Clark Boardman Co., Ltd. New York, N.Y. (1975) [Exhibit E]

[3] Discovery sought is obtainable from some other source that is more convenient, less burdensome, or, less expensive.

else.[4] All Dr. Kearns needs is another law suit!

The origin of the ORDER OF DISMISSAL was DEFENDANTS' MOTION TO DISMISS under Rule 37(b)(2)(C) ... for repeated failure to obey the discovery order of the Special Master and the Court. Kenyon & Kenyon asserts by using Rule 37 that Dr. Kearns "refuses to obey." No. Dr. Kearns fears prosecution. Moreover, Dr. Kearns did not produce the Ford engineering drawings to others so they are outside the Scope of Production under Request to Produce No. 1 above, as are many of the documents now 'separated' by Dr. Kearns.

The Court's 'PROTECTIVE ORDER' of Kearns was invoked at "bait & switch" which occurred twice with the Master's Orders. Should the Master's staff return here for verification checking, that would not occur and would be in accordance with past practice for the same reasons. The time to do so should match both our schedules, as Judge Cohn knows the demands on Dr. Kearns are large. Dr. Kearns worked very long hours to complete the process covering the work in two man-months and while he was sick. Kenyon & Kenyon devoted 15 man-months to their portion. The Master's staff - eight days. 29,000 documents is a lot of documents! Dr. Kearns expended *bona fide* effort. Dr. Kearns' situation was due to inability - fostered neither by its own conduct nor by circumstances within its control.[5] Dr. Kearns needs the Japanese to have confidence in him that he will respect their protective orders[6], as well.

"[W]e think that Rule 37 should not be construed to authorize

---

[4] See ALR Fed 811, 819; 357 U.S. 197.

[5] See 212 U.S. at 350-351. "These two decisions have open the question whether Fifth Amendment due process is violated by the striking of a Complaint because of a plaintiff's inability, despite good faith efforts, to comply with a pretrial production order."

[6] See 284 U.S. 141, 149.

dismissal of this complaint because of petitioners noncompliance with a pretrial production order where it has been established that failure to comply has been due to inability and not to willfulness, bad faith, or any fault of petitioner."

Dr. Kearns needs to receive some discovery, too. In spite of his filing a Motion to Compel, Dr. Kearns has yet to have a single one of his Interrogatories answered or a single document produced by any one of the five Japanese defendants to Dr. Kearns.

Dr. Kearns submitted a notebook to the Court at the hearing of claim charts showing the Japanese infringements. That work was hampered, and still is, by the Defendents not providing engineering values for the components in their circuit drawings. Exhibit H is Chris Benson's Esq. letter to the Defendants of 9 November 1990. That situation has continued for 3 1/4 years. How can an engineer calculate the operation of a circuit without the value of the components? Dr. Kearns' 'component value' needs are detailed in Exhibit H which was submitted to the Court a year ago this February. A lot of time can be saved by including Exhibit H in an order of the Court.

To return to the Court's irksome problems.

Dennis told Dr. Kearns after the hearing that his use of 'Does not exist' was mentioned in passing at the hearing and there are those who think Dr. Kearns 'destroyed or modified' documents. That did not occur. Dr. Kearns received the boxes of copies after the Master had been through them and the Master's staff placed those they thought privileged in cabinet 24. All Dr. Kearns did was go through the documents in the boxes consecutively and note its status, if present. Those not present were marked in his logbook "Do not exist."(for Dr. Kearns).

Again returning to the ORDER OF DISMISSAL complaints.

The allegation is made that Dr. Kearns "lacks the ability to adequately represent himself in the trial of this case." Dr. Kearns has taken steps to educate himself for trial by obtaining and

studying a copy of the transcript: of Gerry Spence's Voir Dire of his jury in the *Silkwood* v. *Kerr-McGee*, No. 76-0888 (Western District of Oklahoma -March '79) case; the opening statement by Scott Baldwin in the *Branch* v. *Liebherr Crane, Inc.*, No. M-79-4-CA (Eastern District of Texas - 1980) case; direct examination by Robert Habush in the *Schulz* v. *Bituminous Casualty Corp.* No. 561-607 (Wisconsin Circuit Court in Milwaukee County, 1986); Cross-Examination by Herman Glaser in *Lewis* v. *Cavalli*, No. 15866/78 State Court of New York, County of Bronx 1984); closing statement by Melvin Block in *Baird* v. *Day & Zimmerman, Inc.*, No. 71Civ3205 (Southern District of New York, 1975).

Don't misunderstand Dr. Kearns. He is simply saying, he is working on preparing for trial. And will read them many times before the actual trial. As he is working on the storage of the documents he hopes to get from the Japanese in discovery.

Dr. Kearns hopes the Court sees some improvement in his papers, in his oral presentations to the Court, his understanding of the Rules of Law, and his ability to focus. Dr. Kearns really turns out a lot of papers! He even wins a few.

Dr. Kearns believes it will get to trial and that he will do quite well in its technical aspects. His experts are available, and ready to work, receiving sporatic checks, if they had documents to work on.

The Court seems worried about the Defendants ability to get ready for trial. Think about it. They have the notebook of claim charts, a large part of 29,000 documents. They are prejudiced?! What about - no values for the electronic components - no answer to a single interrogatories - not one page of documents produced - to Dr. Kearns, and the Defendants are prjudiced? Are we discussing the same case? Why aren't you concerned about that treatment of Dr. Kearns? His Motion to Compel was filed with the Court in November '93. Where is the fairness or even 'approximation of justice' in that?

Moreover, Exhibit I, PRETRIAL ORDER NO. 1, paragraph 1, Toyota, Nissan, Honda, Toyo Kogyo and Fuji Heaby Industries were consolidated for trial and "severed from the claims against the remaining defendants." Mitsubishi was the only one to "piggy-back". So how are the other Defendants included in a Dismissal applicable only to those six? (other than that you are the Judge!, that is.) You say, will present the same problems. Progress usually occurs in Dr. Kearns' life.

Regarding the letters from defendants, Dr. Kearns did not receive them, mainly in the mail, until three days after the hearing. Is that normal, in your experience?

Are you simply accusing Dr. Kearns of not being able to handle the lawyer games and dirty tricks that would not occur with a Melvin Belli representing him?

Regardless, no one can learn this case and technology in 30 days as the Court required at the hearing.

In *Gill* v. *Stolow*, 240 F.2d 669 (1957) which interested Dr. Kearns because the person whose case was dismissed at the District Court level - also suffered surgery in Germany and had trouble getting to a deposition in New York. The Appellate Court's thinking may interest the Court:

> "[I]t is doubtful that any real delay in the trial would have ensued from a decision to take the [belated] deposition ... certainly not one of years, which we new envisage as the result of our necessary reversal."

Dr. Kearns is working hard to please the court-more than it knows.

Respectfully requesting reconsideration[7] -

S/

Robert W. Kearns, *Pro Se*

---

[7] One can learn a lot from the experienced trial masters.

301 Houghton Laboratory Lane
Queenstown, Mary land 21658
(410) 827-9337 (Tel/Fax)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,

Plaintiff,

v. Civil No. 85-70459

TOYOTA, NISSAN, HONDA,
TOYO KOGYO (MAZDA), AND
FUJI (SUBARU),

Defendants./

ORDER

1.

On January 24, 1994 the Court dismissed this case. Plaintiff has filed a timely motion for reconsideration. The motion is DENIED. Local Rule 7.1(h)(3) provides:

> Generally, and without restricting the discretion of the Court, motion for which rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpa-ble defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Nothing in plaintiff's motion papers suggests a palpable defect by which the Court has been misled or show that a different disposition must result from the correction of such a defect.

The motion for reconsideration filed by Maureen Kearns and the motion filed by Arnold, White & Durkee to vacate the order of January 24, 1994 are DENIED. These parties lack standing.

SO ORDERED. S/

AVERN COHN

UNITED STATES DISTRICT JUDGE

DATED: MAR 30 1994

Detroit, Michigan A TRUE COPY

CLERK, U.S. DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

BY s/

DEPUTY CLERK

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1305,-1321

ROBERT W. KEARNS,

Plaintiff-Appellant,

v.

TOYOTA, NISSAN, HONDA, TOYO KOGYO (MAZDA), and FUJI (SUBARU),

Defendants/Cross-Appellants.

ON MOTION

Before CLEVENGER, *Circuit Judge*, COWEN, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

SCHALL, *Circuit Judge*.

ORDER

Toyota et al. move to dismiss Robert W. Kearns's appeal as untimely.[1] In a telephone conveRsation with Toyota, Kearns verbally opposed the motion, but he has not filed a response.

Kearns filed a patent infringement action against Toyota in the United States District Court for the Eastern District of Michigan.

On February 4, 1994, the district court dismissed Kearns's suit with prejudice on the grounds that he was unable to adequately represent himself and he refused to retain counsel.

Kearns sought an extension of time to file a Fed. R. Civ. P. 59(e)

---

[1] Toyota states that if the court dismisses Kearns's appeal, Toyota's cross-appeal, no. 94-1321, will be mooted. We treat Toyota's statement as a motion for voluntary dismissal of its cross-appeal in the event we dismiss Kearns's appeal.

motion seeking reconsideration of the dismissal order. The district court granted Kearns's motion for an extension of time. Kearns filed his R. 59(e) motion on February 22, 1994. On March 31, 1994, the district court denied Kearns's motion. Kearns filed a notice of appeal on May 3, 1994.

Toyota argues that the district court did not have authority to extend the ten-day statutory time period for filing a R. 59(e) motion. Therefore, Toyota contends, Kearns's was required to file a notice of appeal by March 7, 1994, 30 days after the entry of judgment. In the alternative, Toyota argues that even if Kearns's R. 59(e) motion was properly before the district court, Kearns's appeal was untimely because he did not file a notice of appeal within 30 days of the district court's denial of his R. 59(3) motion.

We need not reach the issue of whether the district court properly decided Kearns's R. 59(e) motion. Even if the district court properly granted Kearns an extension of time, Kearns's notice of appeal was filed too late. The district court denied Kearns's R. 59(e) motion on March 31, 1994. Pursuant to Fed. R. Civ. P. 4(a)(1), Kearns had 30 days, until May 2, 1994, to file his notice of appeal. Kearns filed his notice of appeal in this court on May 3, 1994. Therefore, Kearns was one day late and his notice of appeal is untimely.

Finally, we not that, in its February 4, 1994 dismissal order, the district court also dismissed case nos. 78-70642 and 82-70749, which were consolidated with Toyota's district court case, no. 85-70459. Kearns filed notices of appeal in all of these cases on May 3, 1994, which were docketed in this court as appeal nos. 94-1305, 94-1306, 94-1307, 94-1308 and cross-appeal nos. 94-1321 and 94-1322. To date, we have received only the instant motion to dismiss appeal no. 94-1305 as untimely and to voluntarily dismiss cross-appeal no. 94-1321. However, it appears that all of these appeals should be dismissed on the grounds discussed above. Therefore, we intend to dismiss these appeals, absent objection,

within 14 days.

Accordingly,

IT IS ORDERED THAT:

(1) Toyota's motion to dismiss appeal no. 94-1305 is granted.

(2) Toyota's motion to voluntarily dismiss its cross-appeal, no. 94-1321, is granted.

(3) Absent objection, the Clerk is directed to dismiss appeal nos. 94-1306, 94-1307, 94-1308, and cross-appeal no. 94-1322 in 14 days.

(4) All sides shall bear their own costs.

FOR THE COURT

SEP 15 1994 — S/

Date — Alvin A. Schall
Circuit Judge

cc: Robert W. Kearns
James G. Hunter, Jr., Esq.
George E. Badenoch, Esq.
Robert E. Lyon, Esq.
John T. Roberts, Esq.
Thomas Field, Esq.
Albert Robin, Esq.
Donald E. Knebel, Esq.
Robert A. Molan, Esq.
Joseph A. Calvaruso, Esq.
Francis J. Hone, Esq.
Richard D. Kelly, Esq.
Nicholas L. Coch, Esq.

ISSUED AS MANDATE OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KEARNS v. CHRYSLER & AMERICAN MOTORS, 94-1303
KEARNS v. TOYOTA, 94-1305, -1321
KEARNS v. FERRARI, 94-1306
KEARNS v. WOODS v. SWF, 94-1307
KEARNS v. FRED LAVERY PORSCHE, 94-1308
KEARNS v. UNITED TECHNOLOGIES, 94-1310
KEARNS v. BITTMAN, 94-1311
KEARNS v. AMERICAN ARBITRATION ASSOC, 94-1313
KEARNS v. FOLEY & LARDNER
KEARNS v. FULBRIGHT & JAWORSKI

APPELLANT KEARNS' OBJECTION TO THE CLERK IN 14 DAYS IN COMPLIANCE WITH PANEL 94-1305, -1321'S O R D E R of 15 September 1994

Appellant, Robert W. Kearns ("Dr. Kearns") files this Objection in 14 days to comply with Panel 94-1305,-1321's O R D E R of 15 September 1994.

Background (to aid the Clerk)

The Panel 94-1305,-1321's O R D E R of 15 September 1994 beginning at line 1, page 3 is as follows:

> 4(a)(1), Kearns had 30 days, until May 2, 1994, to file his notice of appeal. Kearns filed his notice of appeal in this court on May 3, 1994. Therefore, Kearns was one day late and his notice of appeal is untimely.
>
> Finally, we note that, in its February 4, 1994 dismissal order, the district court also dismissed case nos. 78-70642 and 82-70749, which were consolidated with Toyota's district court case, no. 85-70459. Kearns filed notices of appeal in all of these cases on May 3, 1994, which were docketed in this court as appeal nos. 94-1305, 94-1306, 94-1307, 94-1308 and cross-appeal nos. 94-1321 and 94-1322. To date, we have received only the instant motion to

dismiss appeal no. 94-1305 as untimely and to voluntarily dismiss cross-appeal no. 94-1321. However, it appears that all of these appeals should be dismissed on the grounds discussed above. Therefore, we intend to dismiss these appeals, absent objection, within 14 days.

Actually, on 2 May 1994 Dr. Kearns filed ten appeals in the Night Box which were removed presumably the next morning and date-stamped:

RECEIVED
FROM NIGHT BOX
MAY 03 1994

United States Court of Appeals
for the Federal Circuit

It is Dr. Kearns' usual practice [See Affidavit] to enclose an additional cover sheet of each independently filed paper with a self-addressed-&-stamped envelope with a note for the Deputy Clerk to date-stamp each cover sheet and return them to him in the self-addressed and stamped envelope for Dr. Kearns' records. Unfortunately, only one of the ten independently filed cover sheets was date-stamped by the Deputy Clerk in this instance [Exhibit B]. Fortunately, each of the ten appeals mistakenly filed in the U.S. Court of Appeals for the Federal Circuit ("CAFC") bears a CERTIFICATE OF SERVICE dated 2 May 1994.

After telephoning the Clerk's Office for the CAFC and speaking to the pro se person (hit #6), Dr. Kearns made a special trip to the Clerk's Office (Rm 401) and saw that the Notices of Appeal on file were 'clean' when forwarded with Dr. Kearns' check for $1,050 to John P. Mayer of the U.S. District Court for the Eastern District of Michigan [Exhibit C]. In reviewing, Dr. Kearns' letter with Dr. Kearns' son, Dennis, last evening it was Dennis who said the individual Notices of Appeal would still contain the CERTIFICATE OF SERVICE. Upon checking Dr. Kearns' files that is true, and will be true for the CAFC and

Appellee's files as well. Mr. Charles Ricks had no trouble seeing that it would have been better if Clerk Gindhart's letter to Court Administrator Mayer had said:

> The documents were received from the night box by this court on May 3, 1994. (Clause added.)

To assist the Clerk and the Panel's review of the validity of the ORDERS in response to the Motions to Dismiss, Dr. Kearns is reproducing below the styles of each Notice of Appeal with its corresponding CERTIFICATE OF SERVICE as filed on 2 May 1994 in the same order as the ten titles first listed above:

KEARNS v. CHRYSLER & AMERICAN MOTORS, 94-1303

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

File Number Civil 82-70748

ROBERT W. KEARNS,]
] Notice of Appeal
Plaintiff,]
v.]
] U.S. Constitutional Issue.
CHRYSLER CORPORATION, and]
AMERICAN MOTORS CORPORATION,]
]
Defendant.]

Notice is hereby given that Robert W. Kearns, Plaintiff above

named, hereby appeals to the United States Court of Appeals for the

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal was mailed first class, postage pre-paid, to

Arnold, White & Durkee Corp.
Attn: Steven M. Raymond
May, Simpson
100 W. Long Lake Road
Bloemfield Hills, Michigan 48303-0541

Chrysler Corp.
Michael A. Conley
Pillsbury Madison & Sutro
1667 K Street, N.W.
Washington, D.C. 20011
(Phone) (202) 887-0300
(Fax) (202) 296-7605

Reed Smith Shaw & McClay
Attn: Mr. Casey, Esq.
1200 18th Street, N.W.
Washington, D.C. 20036

this 2nd day of May, 1994.

Bob Kearns

* * *

KEARNS v. TOYOTA, 94-1305, -1321

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN

DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File Number Civil 85-70459

ROBERT W. KEARNS,]
] U.S. Constitutional Issues[9]
Plaintiff,]
]
v.] Notice of Appeal
]
TOYOTA, NISSAN, HONDA,]
TOYO KOGYO (MAZDA),and]
FUJI (SUBARU)]
Defendants.]

Notice is hereby given that Robert W. Kearns, Plaintiff above named, hereby appeals to the United States Court of Appeals for the

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal was mailed first class, postage pre-paid, to

Toyota, et al.
Kenyon & Kenyon
Attn: George E. Badenoch
One Broadway
New York, N.Y. 10004

this 2nd day of May, 1994.

Bob Kearns

* * *

[9] U.S. Constitution: Article I, Section 8, Clause 8; and, Amendment VII.

KEARNS v. FERRARI, 94-1306

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File Number Civil 85-70459

ROBERT W. KEARNS,

U.S. Constitutional issues.

Plaintiff,

v. Notice of Appeal

FERRARI S.p.A.,
AB-VOLVO,
ALFA ROMEO S.p.A.,
AUTOMOBILES-CITROEN, S.A.
BAYERISCHE MOTOREN WERKS, A.G.,
B-L, PLC (British Leland)
FUJI HEAVY INFUSTRIES, LTD.
GROUP LOTUS CARS CO.
HONDA MOTOR CO.
ISUZU MOTOR CO., LTD.
MITSUBISHI MOTORS CORP.
NISSAN MOTOR CO., LTD.
OFFICIENE ALFIERE MASERATI,
PEUGEOT, S.A.
REGIE NATIONALE RENAULT
ROLLS ROYCE MOTORS, LTD.
SAAB-SCANIA AB,
TOYO KOGYO CO., LTD (Mazda)
TOYOTA MOTOR CO., LTD

Dealers in the Detroit area:
BARNETT PONTIAC-DATSUN, INC.
BAVARIAN MOTOR VILLAGE, LTD
DALGLIESH CADILLAC-PEUGEOT
JOE DWYER SUBARU VOLVO, INC.
FALVEY OF TROY
GROSSE POINTE AMC-JEEP RENAULT
LA FONTAINE TOYOTA
SEAWAY MOTORS, INC.
SPORTS CAR EXCHANGE, INC.
TAMAROFF BUICK-DMC-HONDA-ROLLS ROYCE, and
WOOD MOTORS, INC.
Defendants.

Notice is hereby given that Robert W. Kearns, Plaintiff above named, hereby appeals to the United States Court of Appeals for the

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal was mailed first class, postage pre-paid, to

Ferrari, et al.
Kenyon & Kenyon
Attn: George E. Badenoch
One Broadway
New York, N.Y. 10004

this 2nd day of May, 1994.

Bob Kearns

* * *

KEARNS v. WOODS v. SWF, 94-1307

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File Number Civil 78-70642

ROBERT W. KEARNS,]
] U.S. Constitutional issue[10]
Plaintiff,]
v.] Notice of Appeal
]
]
WOODS MOTORS, INC., DAIMLER-]
BENZ AKTIENGESELLSCHAFT, and]
DR. ING. h.c.f. PORSCHE A.G.,]
]
Defendants.]
]

SWF-SPECIALFABRIK fur]
AUTOZEBEHOR GUSTAV RAU G.m.b.H]
a corporation of the Federal]
Republic of Germany]
]
Plaintiff,]
v.] Civil No. 79-CV-74451

[10] Are the emotions of a U.S. citizen-inventor, inferior to the emotions of a U.S. citizen? Is there an unwritten compulsory license section in the title 35 patent law?

] Consolidated with
ROBERT W. KEARNS,] Civil No. 78-70642
] SWF Docket # 122
Defendant.]
]

Notice is hereby given that Robert W. Kearns, Plaintiff above named, hereby appeals to the United States Court of Appeals for the

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal was mailed first class, postage pre-paid, to

Daimler-Benz Aktiengesellschaft
Donald E. Knebel
Barnes & Thornburg
11 S. Meridian Street
Indianapolis, IN 46204

this 2nd day of May, 1994.

Bob Kearns

* * *

KEARNS v. FRED LAVERY PORSCHE, 94-1308

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File Number Civil 82-70749

ROBERT W. KEARNS,]
] U.S. Constitutional issues.

Plaintiff,]
v.] Notice of Appeal
FRED LAVERY PORSCHE, WOOD]
MOTORS, INC., VOLKSWAGEN]
WERKE A.G. WOLFSBURG, and]
AUDI NSU AUTO UNION, A.G.]
]
Defendants.]

Notice is hereby given that Robert W. Kearns, Plaintiff above named, hereby appeals to the United States Court of Appeals for the

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal was mailed first class, postage pre-paid, to

Francis J. Hone
Brumbaugh, Graves
30 Rockefeller Plaza
New York, N.Y. 10112

this 2nd day of May, 1994.

* * * Bob Kearns

KEARNS v. UNITED TECHNOLOGIES, 94-1310

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File Number Civil 92-71408

ROBERT W. KEARNS,]
] Notice of Appeal

Plaintiff,]
v.] U.S. Constitutional issues.
]
UNITED TECHNOLOGIES CORP., and]
UNITED TECHNOLOGIES AUTOMOTIVE, INC.]
]
Defendants.]

Notice is hereby given that Robert W. Kearns, Plaintiff above named, hereby appeals to the United States Court of Appeals for the

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal was mailed first class, postage pre-paid, to

United Technologies
Peter D. McDermott
Allegretti & Witcoff
75 State Street
Boston, MA 02109
(617) 345-9100

this 2nd day of May, 1994.

Bob Kearns

* * *

KEARNS v. BITTMAN, 94-1311

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File Number Civil 93-74013

WILLIAM O. BITTMAN, et al.,]
]
Plaintiffs,]
Counterclaim Defendants,]
] Notice of Appeal
v]
]
ROBERT W. KEARNS,]
]
Defendant,]
Counterclaim Plaintiff,]
]
v]
]
REED SMITH SHAW & McCLAY,]
]
Counterclaim Defendant.]
]

Notice is hereby given that Robert W. Kearns, Plaintiff above named, hereby appeals to the United States Court of Appeals for the

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal was mailed first class, postage pre-paid, to

Reed Smith Shaw & McClay
Attn: Mr. Casey, Esq.
1200 18th Street, N.W.
Washington, D.C. 20036

this 2nd day of May, 1994.

Bob Kearns

* * *

KEARNS v. AMERICAN ARBITRATION ASSOC. 94-1313

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File Number Civil 92-73649

ROBERT W. KEARNS,

Notice of Appeal

Plaintiff,

v.

AMERICAN ARBITRATION ASSOCIATION,
and, ARNOLD, WHITE & DURKEE CORP.

Notice is hereby given that Robert W. Kearns, Plaintiff above named, hereby appeals to the United States Court of Appeals for the

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal was mailed first class, postage pre-paid, to

Arnold, White & Durkee Corp.
Attn: Steven M. Raymond
May, Simpson
100 W. Long Lake Road
Bloomfield Hills, Michigan 48303-0541

this 2nd day of May, 1994.

Bob Kearns

* * *

KEARNS v. FOLEY & LARDNER

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

File Number Misc. Civil 93182

ROBERT W. KEARNS, Plaintiff,	in U.S. District Court for the District of Columbia. U.S. Constitutional Issues[11]
vs.	Notice of Appeal, or in the alternative, Complaint: in the
FOLEY & LARDNER, Defendants.	U.S. District Court for the Eastern District of Michigan Southern Division.

Notice is hereby given that Robert W. Kearns, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Federal Circuit

		entered in
from	description	this action on
CORRECTNESS OF ACTION &	Transcript 21 June '93: page 31, lines 17 - 19;	

[11] Article I, Section 8, clause 8, the exclusive right to make, use[1] and sell. Amendment VI: [T]o be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

[1] *Roche Products* v. *Bolar Pharmaceutical Co.*, 733 F.2d 858 (1984)

EXPRESSIONS page 48, lines 9 - page 51, line 20[12];

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal, or in the alternative, Complaint in the U.S. District Court for the Eastern District of Michigan Southern Division was mailed first class, postage pre-paid, to

Foley & Lardner
Attn: Joseph D. Edmondson, Jr.
3000 K Street, N.W.
Washington, D.C. 20007-5109

this 2nd day of May, 1994.

Bob Kearns

* * *

KEARNS v. FULBRIGHT & JAWORSKI

NOTICE OF APPEAL
TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
FROM JUDGMENTS AND ORDERS
OF A DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

File Number Misc. Civil 93181

] in U.S. District Court for the

] District of Columbia

ROBERT W. KEARNS,]

---

[12] Specific Constitutional matter - among others.

] U.S. Constitutional Issues[13]

Plaintiff,]

vs.] Notice of Appeal, or in the

] alternative, Complaint in the

FULBRIGHT & JAWORSKI,] U.S. District Court for the

] Eastern District of Michigan

Defendants.] Southern Division.

]

Notice is hereby given that Robert W. Kearns, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Federal Circuit

from	description	entered in this action on
CORRECTNESS OF ACTION & EXPRESSIONS	Transcript 21 June '93: page 31, lines 17 - 19; page 48, lines 9 - page 51, line 20[14];	

* * *

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of Notice or Appeal, or in the alternative, Complaint in the U.S. District Court for the Eastern District of Michigan Southern Division was mailed first class, postage pre-paid, to

Fulbright & Jaworski

Attn: Henry F. Schuelke, III

Janis, Schuelke & Wechsler

---

[13] Article I, Section 8, clause 8, the exclusive right to make, use[1] and sell. Amendment VI: [T]o be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

[1] *Roche Products* v. *Bolar Pharmaceutical Co.*, 733 F.2d 858 (1984)

[14] Specific Constitutional matter - among others.

1728 Massachusetts Avenue, N.W.

Washington, D.C. 20036

this 2nd day of May, 1994.

Bob Kearns

* * *

Dr. Kearns' Motion for Reconsideration

Dr. Kearns' Motion for Reconsideration was made in accord with KEARNS' MOTION FOR ENLARGEMENT OF TIMES TO FILE HIS COURT PAPERS AND OTHERWISE COMPLY WITH THE COURT'S RULES & ORDERS

which confirms "the court's verbal agreement to enlarge the time for a Motion for Reconsideration (Ferrari plus) to 22 February 1994. [Exhibit D] (Dr. Kearns' son, Tim's home where Dr. Kearns works while out of Texas, is in a rural area of the Eastern Shore of Maryland subjected to severe ice storms last winter in which the power lines went down often and to stay down. The CAFC offices were also closed as a result of the severe weather even though they are located in the city of Washington, D.C..) In the above styled Motion, Dr. Kearns sought an additional four days but he did not receive a response from the Court.

Dr. Kearns filed PLAINTIFF ROBERT W. KEARNS' MOTION FOR RECONSIDERATION [EXHIBIT E] with the accompanying ***EXHIBITS*** [Exhibit F] with the clerk by Federal Express on 21 February 1994; and mailed first-class to George Badenoch counsel for the Ferrari (Plus) Defendants on 22 February 1994 (See CERTIFICATE OF SERVICE).

Dr. Kearns did not use the additional four days he sought but did not receive a response from the Court.

Under Motion Practice Local Rule LR 7.1(f) [Exhibit G] in part:

> "[T]he Judge to whom the case is assigned may enter an ex parte order (which shall have been prepared by the party making the request) specifying the time within which such

additional documents and brief shall be filed, or ap[prove any written stipulations in regard thereto.

Dr. Kearns requests a copy of Defendant's papers on this Motion to Dismiss. If necessary, Dr. Kearns requests time to receive and study them and to go to the law library and prepare an appropriate response in keeping with the other demands on his time.

Respectfully submitted,

s/

Robert W. Kearns, Pro Se
301 Houghton Laboratory Lane
Queenstown, Maryland 21658
(410) 827-9337 (Tel/Fax)

An index for Dr. Kearns' Motion for Reconsideration and ***EXHIBITS*** follows:

No.	ORDER	Date
12	PLAINTIFF ROBERT W. KEARNS' MOTION FOR RECONSIDERATION	940221
13	EXHIBITS (MOTION FOR RECONSIDERATION)	940221
	A = DEFENDANTS' REQUEST TO PRODUCE NO. 1 TO PLAINTIFF	930302
	B = ORDER (BARKER'S PRODUCTION)	930505
	C = PLAINTIFF KEARNS' MOTION FOR A PROTECTIVE ORDER FROM AN UNTIMELY, PREMATURE & INAPPROPRIATE CONFERENCE CALL	930810
	D = Excerpt from PATENT LAW FUNDAMENTALS Discusses Common-law Rights	
	E = Transcript of 26 January 1994	940126
	F = Excerpt from Ford settlement	901114

	G =	Protective Order from *Kearns* v. *Ford*	791017
No.		ORDER	Date
13 con't	H =	*SOCIETE INTERNATIONALE ...* v. *ROGERS, ATTORNEY GENERAL* 357 U.S. 197	580616
	I =	*United States* v. *Murdock*, 284 U.S. 141	311123
	J =	TWO QUERIES FOR THE RECORD and MOTION TO COMPEL DISCOVERY UNDER FED. R. CIV. P. 37(a)	931120
	K =	Ltr - Benson to Defendants "no component values"	901109
	L =	REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR AN EXTENSION OF TIME TO ANSWER INTERROGATORIES	930202
	M =	PRETRIAL ORDER NO. 1	921218
	N =	Transcript (of hearing)	
	O =	RWK Resume	
	P =	Mergler's letter to U of Md Law School	940403
	Q =	*Gill* v. *Stolow* 240 F.2d 669	570207

FOR THE FEDERAL CIRCUIT

KEARNS v. CHRYSLER & AMERICAN MOTORS, 94-1303
KEARNS v. TOYOTA, 94-1305, -1321
KEARNS v. FERRARI, 94-1306
KEARNS v. WOODS v. SWF, 94-1307
KEARNS v. FRED LAVERY PORSCHE, 94-1308
KEARNS v. UNITED TECHNOLOGIES, 94-1310
KEARNS v. BITTMAN, 94-1311
KEARNS v. AMERICAN ARBITRATION ASSOC, 94-1313
KEARNS v. FOLEY & LARDNER
KEARNS v. FULBRIGHT & JAWORSKI

AFFIDAVIT OF ROBERT W. KEARNS MADE
TO STATE FACTS KNOWN TO HIM
FROM PERSONAL KNOWLEDGE
IN SUPPORT OF
APPELLANT KEARNS' OBJECTION TO THE CLERK
IN 14 DAYS IN COMPLIANCE WITH PANEL 94-1305,-1321'S
O R D E R of 15 September 1994

Robert W. Kearns being duly sworn to tell the truth, states from personal knowledge:

1. I am the Robert W. Kearns who is the Plaintiff or Defendant in the above styled civil actions.

2. On the night of 2 May 1994 I filed ten appeals with the Court of Appeals for the Federal Circuit by dropping them in the night box. I included in the package my check 406 for $1,050.00 to pay the filing fees for the appeals.

3. I also placed in the package a self-addressed-&-stamped envelope with the ten cover sheets of each appeal with a note in which I asked the Deputy Clerk to date stamp each sheet and return it in the envelope.

4. As a result of the process in 3., I received back in the mail the night box date-stamped cover sheet of my *Kearns* v. *Foley & Lardner* Notice of Appeal.

5. In due time, I received in the U.S. mail Clerk Gindhart's letter (with my check) to John P. Mayer, Court Administrator of the U.S. District Court for the Eastern District of Michigan Southern Division.

6. I included a CERTIFICATE OF SERVICE with each of the ten filed appeals.

7. I made each of the ten services as certified.

8. Each of the ten filed appeals bore the case style and CERTIFICATE OF SERVICE as shown in my accompanying paper APPELLANT KEARNS' OBJECTION TO THE CLERK ...

9. I did not receive service of Toyota's papers triggering the O R D E R of 15 September 1994 by the Court of Appeals for the Federal Circuit.

10. Deputy Clerk Cassady extended Dr. Kearns' time to file a Motion for Reconsideration (Ferrari plus) to 22 February 1994.

11. Dr. Kearns filed the Motion for Reconsideration with ***EXHIBITS*** with Federal Express to the Court on 21 February 1994 and to the Ferrari (Plus) representative, George E. Badenoch on 22 February 1994.

Further, Affiant sayest not.

_____

Robert W. Kearns
301 Houghton Laboratory Lane
Queenstown, Maryland 21658

STATE OF MARYLAND)
) Seal
COUNTY OF QUEENS ANNE)

Subscribed and sworn to before me on this 28th day of September 1994.

_____

Notary Public

My Commission expires _____.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of APPELLANT KEARNS' OBJECTION TO THE CLERK IN 14 DAYS IN COMPLIANCE WITH PANEL 94-1305, -1321'S O R D E R of 15 September 1994 with a copy of AFFIDAVIT OF ROBERT W. KEARNS MADE TO STATE FACTS KNOWN TO HIM FROM PERSONAL KNOWLEDGE IN SUPPORT OF APPELLANT KEARNS' OBJECTION TO THE CLERK IN 14 DAYS IN COMPLIANCE WITH PANEL 94-1305, -1321'S O R D E R of 15 September 1994 was mailed first-class to

Toyota, et al. 94-1305,-1321
Kenyon & Kenyon
Attn: George E. Badenoch
One Broadway
New York, N.Y. 10004

this 28th day of September 1994.

S/
Bob Kearns

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1305,-1321

ROBERT W. KEARNS,

Plaintiff-Appellant,

v.

TOYOTA, NISSAN, HONDA,
TOYO KOGYO (MAZDA), and
FUJI (SUBARU),

Defendants/Cross-Appellants.

ON MOTION

Before CLEVENGER, *Circuit Judge*, COWEN, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

SCHALL, *Circuit Judge*.

ORDER

We construe Robert W. Kearns's "Notice to the Court & Request For Relief" as (1) a motion for reconsideration of the court's September 15, 1994 order dismissing appeal no. 94-1305 and cross-appeal no. 94-1321, and directing the clerk to dismiss appeal nos. 94-1306, 94-1307, 94-1308 and cross-appeal no. 94-1322, absent objections,[15] and (2) a motion for an extension of time to file a response to Toyota's motion to dismiss. We construe Kearns's "Objection to the Clerk in 14 days in Compliance with Panel 94-1305, -1321's Order of 15 September 1994" as an additional motion for reconsideration of the court's dismissal

[15] Kearns filed objections. Thus, these appeals were not dismissed pursuant to our September 15 order. However, we consider herein the propriety of dismissal.

order. Toyota opposes all motions. Kearns moves for an extension of time to reply to Toyota's opposition.

Kearns filed a patent infringement action against Toyota in the United States District Court for the Eastern District of Michigan. On February 4, 1994, the district court dismissed Kearns's suit with prejudice on the grounds that he was unable to adequately represent himself and that he refused to retain counsel. The district court also dismissed case nos. 78-70642 and 82-70749, which were consolidated with Toyota's district court case, no 85-70459.

Kearns sought an extension ;of time to file a Fed. R. Civ. P. 59(e) motion seeking reconsideration of the dismissal order. The district court granted Kearns's motion for an extension of time. Kearns subsequently filed a Rule 59(e) motion. On March 31, 1994, the district court denied Kearns's motion. Kearns filed notices of appeal in all of these cases, which were docketed in this court as appeal nos. 94-1305, 94-1306, 94-1307, and 94-1308. Toyota and Daimler-Benz filed cross-appeals, nos. 94-1321 and 94-1322.

Toyota moved to dismiss appeal no. 94-1305 as filed out of time and, if dismissed, to voluntarily dismiss its cross-appeal no. 94-1321. None of the other parties filed motions regarding the remaining appeals. Toyota argued that Kearns's appeal was untimely because (1) the district court did not have the authority to extend the time for filing a Rule 59(e) motion and, thus, Kearns's appeal was filed beyond the 30-day appeal period, (2) even if Kearns filed a timely Rule 59(e) motion, his notice of appeal filed in this court was filed at least one day out of time, or (3) Kearns's notice of appeal was at least three days out of time because the date of filing is the date the district court, not this court, received Kearns's notice of appeal.

In our September 15, 1994 order, we granted Toyota's motion to dismiss on the ground that Kearns filed his notice of appeal at least one day out of time. Kearns's notices of appeal were due to be

filed no later than May 2, 1994. The notices of appeal were stamped as received by this court of appeal at least one day late and we dismissed. The court did not consider Toyota's other grounds for dismissal.

Kearns moves for reconsideration. First, he argues that he did not receive a copy of Toyota's motion to dismiss and moves for an extension ;of time to respond. Toyota submits a certificate of service showing that Kearns was served with a copy of the motion to dismiss by first class mail. Further, Toyota submits proof of delivery from Federal Express that a copy of the motion was deliver to Kearns by overnight mail and was signed for by "R. Kearns." Thus, we are satisfied that Kearns received a copy of the motion to dismiss, and we decline to allow Kearns additional time to respond.

Next, Kearns moves for reconsideration on the ground that he timely filed his notices of appeal on May 2, 1994. Kearns argues that his notices of appeal were left in the court's night box on May 2 and, therefore, they should have been stamped as received by the court on May 2, not on May 3, 1994. After reviewing the copies of the notices of appeal submitted by Kearns with his motion, we conclude that the notices were received in the night box on May 2 and should have been stamped as received on May 2. Thus, Kearns's appeals should not have been dismissed on the ground that they were filed one day out of time. We now consider the alternative grounds for dismissal presented by Toyota in its motion to dismiss and again in its opposition to Kearns's motion for reconsideration.

Toyota first contends that the district court did not have the authority to extend the ten-day statutory period for filing a Rule 59(e) motion. Therefore, Toyota argues, Kearns was required to file a notice of appeal within 30 days after the entry of judgment, and a notice of appeal filed within 30 days of the ruling on the Rule 59(e) motion was untimely.

We agree that the district court did not have the authority to

extend the time for Kearns to file a Rule 59(e) motion. Rule 59(e) states that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 6(b) states specifically that a court "may not extend the time for taking any action under Rule[] ... 59(e)."

The Supreme Court has allowed an exception to this rule where "unique circumstances" exist. In *Thompson* v. *I.N.S.*, 375 U.S. 384 (1964), the petitioner presented his post-trial motions more than 10 days after judgment was entered. However, there was no opposition to petitioner's motions and the trial court specifically declared that the "motion for a new trial" was made "in ample time." *Thompson*, 375 U.S. at 385. Based upon these assurances, petitioner filed a notice of appeal after the post-trial motions were ruled on, which was more than 60 days after the original entry of judgment. The court of appeals dismissed the appeal as filed out of time. The Supreme Court vacated the judgment and held that because the petitioner relied on a statement of the district court and "did an act which, if properly done, postponed the deadline for filing his appeal," there existed "unique circumstances" warranting remand of the case to the court of appeals to be heard on the merits. *Thompson*, 375 U.S. at 387 (citing *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962).

Twenty-five years later, in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989), the Supreme Court clarified its *Thompson* holding. In Osterneck, the Court stated that "[b]y its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." In all circuits that have considered the issue, *Osterneck* has been interpreted as narrowing the unique

circumstances doctrine set out in *Thompson*.[16] These circuits have interpreted *Osterneck* to require something more affirmative than a minute order granting a party's motion for extending the time to file a Rule 59 motion for unique circumstances to exist. *See Hope* v. *United States*, No. 93-3207, 1994 U.S. App. LEXIS 36435, at *7-*8 (7th Cir. Dec. 23, 1994); *In re Mouradick*, 13 F.3d 326, 328-39 (9th Cir. 1994); *Mt. Graham Red Squirrel* v. *Madigan*, 954 F.2d 1441, 1462-63 (9th Cir. 1992); *in re Slimick*, 928 F.2d 304, 310 (9th Cir. 1990;[17] *Feinstein* v. *Moses*, 951 F.2d 16, 21 (1st Cir. 1991); *Pinion* v. *Dow Chemical, U.S.A.*, 928 F.2d 1522, 1534 (11th Cir. 1991); *Kraus* v. *Consolidated Rail Corp.*, 899 F.2d 1360, 1354-66 (3d Cir. 1990); *see also Collard* v. *U.S.*, 10 F.3d 718 (10th Cir. 1993).

Thus, our sister circuits that have considered the issue post *Osterneck* do not view the mere grant by the district court of an extension ;of time to file a Rule 59(e) motion as creating unique circumstances that would toll the time for filing a notice of appeal. Although Kearns was granted an extension of time to file Rule 59(e) motion, the district court was without authority to extend the time. Therefore, Kearns's motion for reconsideration did not toll the time for filing his notices of appeal. To be timely, Kearns was required to file his notices of appeal within 30 days of the district court's entry of judgment, that is, by March 7, 1994. Kearns filed his notices of appeal on May 2, 1994. Thus, Kearns's notice of appeal were filed out of time.

---

[16] In *Fairley* v. *Jones*, 824 F.2d 440 (5th Cir. 1987), the Fifth Circuit allowed the late filing of an appeal under similar circumstances. However, this case was decided before *Osterneck* and the Fifth Circuit has no post-*Osterneck* cases.

[17] In *Mouradick*, *Mt. Graham*, and *Slimick*, the Ninth Circuit was in conformance with other circuits. However, in *Miller* v. *Maxwell's Int'l., Inc.*, 991 F.2d 583, 585 (9th Cir. 1993), the Ninth Circuit, relying on a pre-*Osterneck* case,held the other way.

Toyota also argues that even if Kearns had until May 2 to file his notices of appeal, he was required to file the notices of appeal in district court, not in this court. Fed. R. Civ. P. 4(a)91) allows an appeal to be docketed as filed on the date it is received by an appellate court when an appellant mistakenly files the notice in the appellate court. Toyota maintains that Kearns did not "mistakenly" file his notices of appeal in this court, and he is not entitled to the "mistakenly filed" exception of Rule 4(a)(1).

It is difficult to determine with certainty whether Kearns purposely or mistakenly filed his notices of appeal in this court instead of in the district court. Thus, we decline to sustain our dismissals of Kearns's appeals on this ground. However, Kearns is not on notice that any future notices of appeal from district court actions must be filed in the district court. Any future notice of appeal from a district court action filed by Kearns in this court will not be considered a "mistake" for purposes of Rule 4(a)(1).

Finally, regarding Kearns's motion for an extension of time to file a reply to Toyota's oppositions, Kearns is not entitled to reply. See Fed. R. App. P. 27. Furthermore, a reply by Kearns would not change the court's determination that our dismissal of the appeals was appropriate.

Accordingly,

IT IS ORDERED THAT:

(1) Kearns's motions for reconsideration of the court's dismissal order are denied.

(2) Kearns's motion for an extension of time to file a response to Toyota's motion to dismiss is denied.

(3) Appeal nos. 94-1306, 94-1307, 94-1308, and 94-1322 are hereby dismissed.

(4) Kearns's motion for an extension of time to file a reply is denied.

(5) All sides shall bear their own costs.

FOR THE COURT

FEB 15 1995

Date

Alvin A. Schall
Circuit Judge

cc: Robert W. Kearns
James G. Hunter, Jr., Esq.
George E. Badenoch, Esq.
Robert E. Lyon, Esq.
John T. Roberts, Esq.
Thomas Field, Esq.
Albert Robin, Esq.
Donald E. Knebel, Esq.
Robert A. Molan, Esq.
Joseph A. Calvaruso, Esq.
Francis J. Hone, Esq.
Richard D. Kelly, Esq.
Nicholas L. Coch, Esq.

ISSUED AS A MANDATE
Nos. 94-1306, -1307, -1308, -1322, ONLY FEB 15 1995